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## BEYOND FRACKING: HOW *ROBINSON TOWNSHIP* ALTERS PENNSYLVANIA MUNICIPAL ZONING RIGHTS

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BEYOND FRACKING: HOW *ROBINSON TOWNSHIP* ALTERS  
PENNSYLVANIA MUNICIPAL ZONING RIGHTS

*Christian C. Hagen-Frederiksen*\*

I. INTRODUCTION

On December 19, 2013, the Pennsylvania Supreme Court released its opinion in *Robinson Township v. Commonwealth*,<sup>1</sup> a highly-anticipated and hotly-debated decision regarding the balance between the ability of municipalities to ban hydraulic fracturing from its borders and Pennsylvania's recently-passed Act 13 of 2012, which amended Pennsylvania's Oil and Gas Act.<sup>2</sup> The decision marked a significant point in the history of hydraulic fracturing in the Commonwealth, a history that has been highlighted by significant amounts of debate and controversy. In the Pennsylvania Supreme Court's plurality opinion—the applicability of which has since been questioned by the Pennsylvania Commonwealth Court<sup>3</sup>—Chief Justice Castille held that portions of Act 13<sup>4</sup> were in conflict with the Environmental Rights Amendment of the Pennsylvania Constitution<sup>5</sup> and rendered the Commonwealth incapable of performing its “duty as trustee of Pennsylvania’s public natural resources.”<sup>6</sup>

The significant depth of the opinion, questions of its lasting applicability as a plurality opinion, and its strengthening of article I, section

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<sup>1</sup> *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013).

<sup>2</sup> 58 PA. CONS. STAT. §§ 2301–3504 (2012).

<sup>3</sup> *Pa. Env'tl. Def. Found. v. Commonwealth*, 108 A.3d 140, 159 (Pa. Commw. Ct. 2015).

<sup>4</sup> Specifically, sections 3215(b)(4), 3215(d), 3303, and 3304 of the Pennsylvania Oil and Gas Act were held to be unconstitutional by the plurality. *Robinson Twp.*, 83 A.3d at 985.

<sup>5</sup> PA. CONST. art. I, § 27.

<sup>6</sup> *Robinson Twp.*, 83 A.3d at 985.

27 of the Pennsylvania Constitution all create an opinion where “the implications . . . will be felt for years, perhaps decades.”<sup>7</sup> While the re-establishment of article I, section 27, its nature as a plurality opinion, and its general negative effect on the hydraulic fracturing industry have been widely discussed elsewhere,<sup>8</sup> the opinion also reaffirms existing powers and places new burdens on municipalities.<sup>9</sup> Part II of this Note will provide an overview of the *Robinson Township* opinion and of the legal landscape of municipal zoning rights and responsibilities in Pennsylvania. Part III will discuss how *Robinson Township* altered those existing zoning rules. Part IV will discuss both the implications of this opinion beyond hydraulic fracturing and the subsequent legal activities stemming from *Robinson Township*. Part V will suggest a “hybrid” approach, encompassing several of the competing interests of the Commonwealth, its citizens, and municipalities.

## II. *ROBINSON TOWNSHIP* AND PENNSYLVANIA MUNICIPAL ZONING LAW

### A. *Act 13 and Robinson Township*

Governor Tom Corbett signed Pennsylvania Act 13 into law on February 14, 2012.<sup>10</sup> The Act, among its provisions, “establishes a system for collecting impact fees [a levy imposed on drillers by the Commonwealth to offset the cost of drilling on the Commonwealth and local municipalities] from hydrofracturing,” and establishes or changes

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<sup>7</sup> John Dernbach, *The Pennsylvania Supreme Court's Robinson Township Decision: A Step Back for Marcellus Shale, A Step Forward for Environmental Rights and the Public Trust*, WIDENER ENVTL. L. CENTER BLOG (Dec. 21, 2013, 9:39 AM), <http://blogs.law.widener.edu/envirolawcenter/2013/12/21/the-pennsylvania-supreme-courts-robinson-township-decision-a-step-back-for-marcellus-shale-a-step-forward-for-article-i-section-27/>.

<sup>8</sup> For greater depth on how the *Robinson Township* decision can affect the national perception of hydraulic fracturing see Joshua P. Fershee, *Facts, Fiction, and Perception in Hydraulic Fracturing: Illuminating Act 13 and Robinson Township v. Commonwealth of Pennsylvania*, 116 W. VA. L. REV. 829 (2014).

<sup>9</sup> See also Jesse J. Richardson, Jr., *Local Regulation of Hydraulic Fracturing*, 117 W. VA. L. REV. 593 (2014) (providing a broader analysis of local regulation over hydraulic fracturing in a variety of states, including Pennsylvania).

<sup>10</sup> Act of Feb. 14, 2012, Pub. L. 87, No. 13 (codified at 58 PA. CONS. STAT. §§ 2301–3504 (2012)).

permit requirements for oil and gas operations in the state.<sup>11</sup> Act 13 was brought about largely due to the then-emerging practice of extracting natural gas from the Marcellus Shale [natural formation] in Pennsylvania.<sup>12</sup> Marcellus Shale “is a sedimentary rock buried thousands of feet beneath . . . upstate New York south through Pennsylvania to West Virginia and west to parts of Ohio.”<sup>13</sup> Although there are many shale formations throughout the world, Marcellus Shale is “thought to contain up to 10 percent of available natural gas deposits in North America,”<sup>14</sup> and, as such, has been a hotbed for both development activity and concerns about the impact of development on the environment.<sup>15</sup> Natural gas development has also become a hot-button political issue, especially over the prospect of natural gas development on public lands.<sup>16</sup> As part of these development efforts, natural gas is typically extracted through hydraulic fracturing—pumping a mixture of sand, water and chemicals into the shale, causing fractures which allow the gas to escape—or through horizontal drilling.<sup>17</sup>

Act 13 quickly became subject to legal challenges from various citizens’ groups and townships. In March 2012, several Pennsylvania citizens filed suit in the Pennsylvania Commonwealth Court, arguing that

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<sup>11</sup> John C. Dernbach et al., *Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications*, 67 RUTGERS L. REV. 1169, 1172 (2015).

<sup>12</sup> *Id.* at 1171.

<sup>13</sup> *The Marcellus Shale, Explained*, NAT’L PUB. RADIO, <http://stateimpact.npr.org/pennsylvania/tag/marcellus-shale/> (last visited Feb. 19, 2016).

<sup>14</sup> Dernbach et al., *supra* note 11, at 1171.

<sup>15</sup> See Katharine Q. Seelye, *Gas Boom Aids Pennsylvania, But Some Worry Over the Risk*, N.Y. TIMES, Oct. 15, 2011, at A1, available at [http://www.nytimes.com/2011/10/15/us/hydraulic-fracturing-brings-money-and-problems-to-pennsylvania.html?pagewanted=all&\\_r=1](http://www.nytimes.com/2011/10/15/us/hydraulic-fracturing-brings-money-and-problems-to-pennsylvania.html?pagewanted=all&_r=1), for more information about Pennsylvanians’ concerns over the environmental impact of hydraulic fracturing.

<sup>16</sup> See Laura Legere, *Gov. Wolf bans new leases for drilling on state lands*, PITTSBURGH POST-GAZETTE (Jan. 29, 2015, 12:34 PM), <http://powersource.post-gazette.com/powersource/home-powersource/2015/01/29/Governor-Wolf-signs-order-banning-new-gas-drilling-leases-on-Pennsylvania-public-lands/stories/201501290301>; Andrew McGill, *Fracking opponents focusing on Allegheny County parks plan*, PITTSBURGH POST-GAZETTE (Aug. 12, 2013, 12:00 AM), <http://www.post-gazette.com/local/marcellusshale/2013/08/12/Fracking-opponents-focusing-on-Allegheny-County-parks-plan/stories/201308120100>; Donald Gilliland, *Corbett opens state parks and forests to additional, restricted drilling*, HARRISBURG PATRIOT-NEWS (May 23, 2014, 6:11 AM), [http://www.pennlive.com/midstate/index.ssf/2014/05/corbett\\_opens\\_state\\_parks\\_and.html](http://www.pennlive.com/midstate/index.ssf/2014/05/corbett_opens_state_parks_and.html) (providing examples of municipalities and the Commonwealth both opening and closing state and municipal lands for natural gas development).

<sup>17</sup> For more information on the process of hydraulic fracturing see *Natural Gas Extraction—Hydraulic Fracturing*, U.S. ENVTL. PROTECTION AGENCY, <http://www2.epa.gov/hydraulicfracturing> (last visited Feb. 19, 2016).

the entirety of Act 13 was unconstitutional.<sup>18</sup> On July 26, 2012, the Commonwealth Court determined that several portions of Act 13 were unconstitutional, specifically section 3215(b)(4), section 3304, and remaining portions of chapter 33 that enforced section 3304.<sup>19</sup> Section 3215(b)(4) stated that the Department of Environmental Protection must waive distance restrictions that would ordinarily prohibit disrupting areas within certain distances of water bodies as long as the permit applicant submits “a plan identifying additional measures . . . to be employed . . . necessary to protect the waters.”<sup>20</sup> Section 3304 required that “all local ordinances regulating oil and gas operations shall allow for the reasonable development of oil and gas resources.”<sup>21</sup> As part of section 3304’s reasonableness mandate, the statute “imposes uniform rules for hydrofracturing in the state, prohibits local governments from establishing more stringent rules, and establishes limited time periods for local review of drilling proposals.”<sup>22</sup>

Following the Commonwealth Court’s decision, the Supreme Court of Pennsylvania heard arguments and issued its decision on December 19, 2013. The plurality opinion addresses the “justiciability” of the dispute<sup>23</sup> and the constitutionality of Act 13.<sup>24</sup> The court determined that both landowners and municipalities had standing to challenge Act 13 stating that municipalities have “a substantial, direct, and immediate interest in protecting the environment and the quality of life within its borders, which interest confers . . . standing in a legal action to enforce environmental standards.”<sup>25</sup> Because municipalities are “legal persons” and because environmental protection is an “essential aspect of Pennsylvanians’ quality of life,” the court determined that “[l]ocal government, therefore, has a substantial or direct interest in the outcome of litigation premised upon changes . . . which would alter the physical nature of the [municipality].”<sup>26</sup>

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<sup>18</sup> *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 915–16 (Pa. 2013).

<sup>19</sup> *Robinson Twp. v. Commonwealth*, 52 A.3d 463 (Pa. Commw. Ct. 2012); *Robinson Twp.*, 83 A.3d at 916.

<sup>20</sup> 58 PA. CONS. STAT. § 3215(b)(4).

<sup>21</sup> 58 PA. CONS. STAT. § 3304(a).

<sup>22</sup> *Dernbach et al.*, *supra* note 11, at 1172.

<sup>23</sup> *Robinson Twp.*, 83 A.3d at 916.

<sup>24</sup> *Id.* at 930.

<sup>25</sup> *Id.* at 919–20 (citing *Susquehanna Cnty. v. Commonwealth*, 458 A.2d 929, 931 (Pa. 1983)).

<sup>26</sup> *Id.* at 920.

More substantially, the court analyzed whether Act 13 was incompatible with article I, section 27 of the Pennsylvania Constitution (the Environmental Rights Amendment),<sup>27</sup> Due Process under the Pennsylvania Constitution and U.S. Constitution,<sup>28</sup> and article II, section 1 of the Pennsylvania Constitution.<sup>29</sup> The court found that the case exceeded a mere zoning dispute; instead, it “center[ed] upon an asserted vindication of citizens’ rights to quality of life on their properties and in their hometowns.”<sup>30</sup> In doing so, the court leaned heavily on the Environmental Rights Amendment, determining that the rights of citizens to clean air and water, as well as the requirement to preserve the “natural, scenic, historic and esthetic values of the environment” are on “presumptively” equal grounds to the other rights provided in the Pennsylvania Constitution.<sup>31</sup> The amendment, which was implemented in 1971 following decades of degradation of Pennsylvania’s natural resources as a result of heavy industry, guaranteed the Commonwealth’s resources as the property of all people, then-current and future, of the state.<sup>32</sup> Additionally, because natural resources are within the public trust of the Commonwealth, it is a “fiduciary obligated . . . to prevent and remedy the degradation, diminution, or depletion of our public natural resources.”<sup>33</sup> As such, the Commonwealth is both prohibited from acting unreasonably in its Environmental Rights Amendment mandate, and required to “act affirmatively to protect the environment, via legislative action.”<sup>34</sup> The court determined that because Act 13 grants industrial oil and gas operations the right to operate in “every zoning district of the Commonwealth, including in residential, commercial, and agricultural districts,” Act 13 “degrades the corpus of the trust” by prohibiting local governments from “mitigating the impact of oil and gas development at a local level.”<sup>35</sup> The “sweeping import” of Act 13, the

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<sup>27</sup> PA. CONST. art. I, § 27.

<sup>28</sup> PA. CONST. art. I, § 1; U.S. CONST. amend. XIV.

<sup>29</sup> PA. CONST. art. II, § 1.

<sup>30</sup> *Robinson Twp.*, 83 A.3d at 942.

<sup>31</sup> *Id.* at 953.

<sup>32</sup> See Richard Rinaldi, *After Lying Dormant for Decades, Pennsylvania’s Environmental Rights Amendment Recently Received a Spark of Life from Robinson Township v. Commonwealth*, 24 WIDENER L. REV. 436 (2015) (explaining further the history of the Environmental Rights Amendment).

<sup>33</sup> *Robinson Twp.*, 83 A.3d at 957.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 980.

degradation of that trust, and the “disparate impact on some citizens” make Act 13 “incompatible with the express command of the Environmental Rights Amendment,” and, as such, was unconstitutional.<sup>36</sup>

### *B. Pennsylvania Zoning Law*

The Pennsylvania Municipalities Planning Code was created in 1968 in part to “accomplish coordinated development; to guide uses of land, structures, streets, and public facilities; to promote preservation of natural and historic resources; to encourage revitalization of urban centers; to encourage consistency of comprehensive plans and land use regulations.”<sup>37</sup> The Code allows and lays out procedures for municipalities that wish to create planning commissions, comprehensive plans, official maps, subdivisions and land developments, municipal capital improvements, zoning, residential developments, neighborhoods, joint zones with other municipalities, zoning hearing boards, and appeals.<sup>38</sup>

However, certain Commonwealth interests and activities have routinely come into conflict with the zoning desires of municipalities. In 1976, the Pennsylvania Supreme Court in *City of Pittsburgh v. Commonwealth* determined that Commonwealth activities—in this case, a pre-release center by the Bureau of Corrections—would be subject to local zoning regulations even when the activity is specifically authorized by legislative action.<sup>39</sup> Although the Bureau of Corrections was permitted to establish these centers, the legislature directed that “whenever zoning regulations impose higher standards than are required in any other statute the zoning regulations shall govern.”<sup>40</sup> Unless the legislature specifically intended to override local zoning regulations, local regulations govern.<sup>41</sup>

In 1984, however, the Pennsylvania Supreme Court determined that a state agency’s statutorily-granted plans for land usage are subject to the municipal zoning scheme, regardless of whether the zoning is for usage or

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<sup>36</sup> *Id.* at 982.

<sup>37</sup> *Pennsylvania Municipalities Planning Code Quick Guide*, GOVERNOR’S CENTER FOR LOCAL GOV’T SERV. (Jan. 2003), available at [http://mpc.landuselawinpa.com/MPC\\_quick\\_guide.pdf](http://mpc.landuselawinpa.com/MPC_quick_guide.pdf).

<sup>38</sup> 53 PA. STAT. ANN. §§ 10201–11202 (West 2016).

<sup>39</sup> *City of Pittsburgh v. Commonwealth*, 360 A.2d 607 (Pa. 1976).

<sup>40</sup> *Id.* at 613 (internal quotations omitted).

<sup>41</sup> *Id.*

for setback, height, or other similar restrictions.<sup>42</sup> In *Commonwealth Dep't of General Services v. Ogontz Area Neighbors Ass'n*, the Department of General Services sought to create a facility for mentally handicapped persons and filed the necessary permits with the City of Philadelphia to do so.<sup>43</sup> The city denied the application on the grounds that the use of the building was barred in the zoning area and imposed a number of setback, height and other restrictions.<sup>44</sup> The court clarified *City of Pittsburgh*, stating that statutes which grant eminent domain powers to state agencies are not indicators that state agencies can override local zoning regulations.<sup>45</sup> The Pennsylvania Supreme Court engaged in a balancing test, weighing the frustration of the city's zoning scheme with the potential frustration of the Commonwealth's mandate to establish mental health facilities in its desired location. As such, the court determined that "in the case of a conflict between [an agency's] land use plans and the zoning use regulatory scheme of [a municipality], the zoning scheme shall prevail."<sup>46</sup>

In 1993, the Pennsylvania Supreme Court in *Olon v. Commonwealth Department of Corrections* clarified that *Ogontz* only governed situations where there was no direct mandate by the legislature for an agency's desired usage of a particular piece of property.<sup>47</sup> In this case, the legislature "specified both the property to be acquired and the specific use of that property," differentiating it from *Ogontz* and *City of Pittsburgh*.<sup>48</sup> As such, the court determined that when the legislature either authorizes an agency to acquire unspecified property for a specified purpose or where an agency is authorized to acquire specific property for an unspecified purpose, the agency is subject to local zoning.<sup>49</sup> In the case where specific property is to be used for a specific purpose, an agency may override local zoning.<sup>50</sup>

In 1992, the Commonwealth Court confronted a case where local zoning went beyond merely regulating location and configuration through

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<sup>42</sup> *Commonwealth Dep't of Gen. Servs. v. Ogontz Area Neighbors Ass'n*, 483 A.2d 448 (Pa. 1984).

<sup>43</sup> *Id.* at 449–50.

<sup>44</sup> *Id.* at 450.

<sup>45</sup> *Id.* at 454.

<sup>46</sup> *Id.* at 455.

<sup>47</sup> *Olon v. Commonwealth Dep't of Corrections*, 626 A.2d 533 (Pa. 1993).

<sup>48</sup> *Id.* at 535.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*



its zoning powers, but regulated the operation of coal mining activities.<sup>51</sup> There, where a township passed extensive amendments to its zoning ordinance regulating the operation of coal mining activities, the Commonwealth Court determined that the municipality's zoning ordinance regulating operation was "more extensive than the traditional land use controls accomplished by zoning," and were preempted by a state statute specifically regulating mining operations.<sup>52</sup> In 2011, however, the Pennsylvania Supreme Court clarified, stating that in a situation where a township zoning ordinance required mining activities to be set back from residences, the state statute governing operations does not preempt.<sup>53</sup> In sum, municipalities may not govern operations through zoning if those operations are already regulated by state statute, but may require certain restrictions that do not regulate operations.

### III. *ROBINSON TOWNSHIP'S* ALTERATION OF THE LANDSCAPE

*Robinson Township* adds a piece to this puzzle. Where section 3304 of Act 13 "permits industrial oil and gas operations as a use 'of right' in every zoning district throughout the Commonwealth," the Pennsylvania Supreme Court determined that the granting of that permission "degrades the corpus of the trust" between the Commonwealth and its citizens to protect the environment.<sup>54</sup> Although sections 3303 and 3304 allow the Commonwealth to preempt local regulation and require local ordinances to allow for "reasonable development" of oil and gas,<sup>55</sup> Act 13 does not provide the strict specificity of both property and purpose that existed in *Olon*. Even further, section 3304 restricts the ability of municipalities to "impose conditions, requirements or limitations . . . that are more stringent than [those] imposed on construction activities for other industrial uses,"<sup>56</sup> and similarly restricts a municipality's ability to impose extra regulations on

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<sup>51</sup> Pa. Coal Co. v. Twp. of Conemaugh, 612 A.2d 1090 (Pa. Commw. Ct. 1992).

<sup>52</sup> *Id.* at 1093.

<sup>53</sup> Hoffman Mining Co. v. Zoning Hearing Bd., 32 A.3d 587 (Pa. 2011).

<sup>54</sup> Robinson Twp. v. Commonwealth, 83 A.3d 901, 979–80 (Pa. 2013).

<sup>55</sup> 58 PA. CONS. STAT. ANN. §§ 3303–04 (2012).

<sup>56</sup> *Id.* § 3304(b)(2).

“height of structures, screening and fencing, lighting or noise relating to permanent oil and gas operations.”<sup>57</sup>

The strict restrictions on municipal authority to impose restrictions on oil and gas activities beyond those imposed on other industrial activities indicates that Act 13 seeks to alter municipal authority both towards typical zoning restrictions (setback, height, and other structural concerns) and the actual operations of the oil and gas activities. This would appear to be more similar to the Commonwealth Court’s *Conemaugh* decision on municipal regulations over the operation of an industrial activity. Act 13 appears to extend a similar series of specific regulations to oil and gas operations as the legislature did for coal mining operations at issue in *Conemaugh*. Act 13, however, seems to venture more into the type of regulation in *Hoffman Mining*, where setback restrictions over mining activities were not preempted by state statute regulating operations.<sup>58</sup> Section 3304 robs municipalities of the ability to determine that oil and gas operations may require different and potentially more stringent restrictions than those for other industrial activities.

Justice Baer, who concurred with the plurality on due process grounds, paints zoning as fundamental to due process concerns of protecting a resident and his property from being harmed by other residents and their property.<sup>59</sup> Because the authority of municipalities to zone is statutory, Justice Baer frames the question as whether the legislature can “remove *en toto* from local municipalities the apparatus it provided to vindicate the individual substantive due process rights of Pennsylvanian landowners?”<sup>60</sup>

In his answer, he indicates that “once a state authorizes political subdivisions to zone for the best interests of the health, safety and character of their communities, and zoning ordinances are enacted and relied upon . . . the state may not alter or invalidate those ordinances, given their constitutional underpinning.”<sup>61</sup> Regardless of whether the state has “compelling justification” for invalidating municipal authority to zone as it

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<sup>57</sup> *Id.* § 3304(b)(3).

<sup>58</sup> *Hoffman Mining Co.*, 32 A.3d at 607.

<sup>59</sup> *Robinson Twp.*, 83 A.3d at 1001–02 (Baer, J., concurring).

<sup>60</sup> *Id.* at 1002 (Baer, J., concurring).

<sup>61</sup> *Id.* at 1006 (Baer, J., concurring) (internal quotations and citations omitted).

pleases, the state may not override the zoning wishes of a municipality.<sup>62</sup> In other words, Justice Baer seems to place paramount importance on maintaining the fidelity of municipalities to—after considering the unique needs of their individual communities—establish zones as they see fit in order to protect the constitutional right of its residents from being disturbed by other residents.

The constitutional importance of due process and zoning—which appeared in the Commonwealth Court opinion but not in the plurality<sup>63</sup>—adds interesting depth and power to the zoning rights of municipalities in relation to the state’s ability to supersede those zoning ordinances. Where Pennsylvania courts had in the past provided caveats to municipal zoning power—the balancing test in *Ogontz*, the specific mandate in *Olon*, the preemption over operations regulation in *Conemaugh*—the rationale employed by the Commonwealth Court and by Justice Baer in his concurrence would indicate that because local zoning was authorized by the legislature to weigh the needs of the community, it cannot be preempted by state statute regardless of whether the state’s goals are frustrated or the state specifically mandates a particular use. The opinion that municipalities should determine zoning is one with a fair bit of contention,<sup>64</sup> and the notion that “local constituencies should enjoy broad powers of self-government where the state legislature cannot reach a consensus about an issue” is advocated by at least one scholar.<sup>65</sup> However, others feel as though other constitutional challenges (the Contracts Clauses, for example) possess the potential to have a stronger impact.<sup>66</sup>

Additionally, the dissents of Justice Eakin and Justice Saylor are noteworthy. Justice Saylor views municipalities as “creatures of the General Assembly” and the General Assembly’s statutes as superior to municipal

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<sup>62</sup> *Id.* (Baer, J., concurring).

<sup>63</sup> *Robinson Twp.*, 53 A.3d at 484–85.

<sup>64</sup> See *Exton Quarries, Inc. v. Zoning Bd.*, 228 A.2d 169, 179 (Pa. 1967) (“The constitutionality of zoning ordinances which totally prohibit legitimate businesses . . . from an entire community should be regarded with particular circumspection . . .”).

<sup>65</sup> See Roderick M. Hills, Jr., *Hydrofracking and Home Rule: Defending and Defining an Anti-Preemption Canon of Statutory Construction in New York*, 77 ALB. L. REV. 647, 672 (2014) (providing an in-depth analysis on local control over hydraulic fracturing in New York state).

<sup>66</sup> Russell Bopp, Comment, *A Wolf in Sheep’s Clothing: Pennsylvania’s Oil and Gas Lease Act and the Constitutionality of Forced Pooling*, 52 DUQ. L. REV. 439, 461–62 (2014).

zoning.<sup>67</sup> Justice Saylor criticizes the plurality's decision to "completely redefine the role of municipalities relative to the sovereign," and reaffirms his belief in the legislature's authority to use its police power to "further both the economic and environmental interests of the Commonwealth and its citizens at large."<sup>68</sup> Justice Eakin's dissent also rejects the argument that the zoning ability of municipalities is a constitutional right, stating that because the ability for municipalities to zone was originally granted by the legislature, the legislature reserves the ability to modify or remove that right.<sup>69</sup> The dissents seem to echo the U.S. Supreme Court's decision in *Atkin v. Kansas*, which determined that municipalities are "the creatures, mere political subdivisions, of the State for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such may be necessarily implied from those granted."<sup>70</sup> Both dissents underscore a consistent belief: extraction of natural gas is a statewide concern better suited to the statewide legislature. As such, while municipal zoning has its time and place, natural gas extraction is not that time or place.

Emerging since *Robinson Township* have been several cases which alter the potential application of the ruling. In *ION Geophysical Corp. v. Hempfield Township*, the United States District Court for the Western District of Pennsylvania elected not to extend the *Robinson Township* holding to a case involving a township's refusal to grant a permit allowing seismic testing by a private company within its borders.<sup>71</sup> Although the court described *Robinson Township* as "significant," because the portions of Act 13 addressed in *Robinson Township* never went into effect it "cannot presume that the *Robinson Township* case has any effect on Pennsylvania's oil and gas laws enacted prior to Act 13, or that were not at issue in the case."<sup>72</sup>

The western district takes a very reserved view of *Robinson Township*, indicating that the Pennsylvania Supreme Court's opinion only affects Act

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<sup>67</sup> *Robinson Twp.*, 83 A.3d at 1010.

<sup>68</sup> *Id.* at 1010–13.

<sup>69</sup> *Id.* at 1015.

<sup>70</sup> *Atkin v. Kansas*, 191 U.S. 207, 220 (1903).

<sup>71</sup> *ION Geophysical Corp. v. Hempfield Twp.*, No. 14-410, 2014 WL 1405397 (W.D. Pa. Apr. 10, 2014).

<sup>72</sup> *Id.* at \*7.

13 itself, rather than expansively affecting a myriad of environmental, industrial and commercial activities through Article 27 and zoning due process. Because of this restrictive view of *Robinson Township* by the western district that “the extraction of oil and gas in the state of Pennsylvania is being legislated as a statewide issue,” local municipalities are “limited in regulating such activities, primarily . . . zoning.”<sup>73</sup> The western district’s “take it or leave it” approach, quoting Eakins’ dissent that “the question [regarding natural gas extraction] is not ‘if’ this will happen but ‘how,’”<sup>74</sup> only continues to demonstrate a narrow interpretation of *Robinson Township*.

In 2014, the Commonwealth Court of Pennsylvania determined that even given the Pennsylvania Supreme Court’s *Robinson Township* holding, “section 3302 [of Act 13] remains operative.”<sup>75</sup> Section 3302 supersedes “all local ordinances purporting to regulate oil and gas operations regulated by [Act 13],” with the exception of local ordinances adopted pursuant to the Municipalities Planning Code.<sup>76</sup> In this case, the court determined that the challenged municipal ordinances were procedurally invalid and, as such, did not fall under Act 13 jurisdiction.<sup>77</sup> As such, the Commonwealth Court’s reiteration that the portions of Act 13 which allow the Commonwealth to supersede local regulation over oil and gas is another blow towards the broad applicability of *Robinson Township*.

Additionally, *Robinson Township* has been referenced when it comes to current industrial projects. In a 2014 review of a pending pipeline project before the Pennsylvania Public Utility Commission (the “PUC”), Sunoco Pipeline, L.P. argued that environmental groups challenging the action needed to produce definitive evidence indicating environmental harm under section 27 and *Robinson Township* and, in the absence of such evidence, the PUC should deny the challenging groups’ preliminary objections.<sup>78</sup> Sunoco’s argument that *Robinson Township*’s Act 13 argument was irrelevant to Section 619 of the Municipal Planning Code and the PUC’s

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<sup>73</sup> *Id.* at \*9.

<sup>74</sup> *Id.* (quoting *Robinson Twp.*, 83 A.3d at 1015).

<sup>75</sup> *Seitel Data, Ltd. v. Center Twp.*, 92 A.3d 851 n.3 (Pa. Commw. Ct. 2014).

<sup>76</sup> 58 PA. CONS. STAT. § 3302 (2012).

<sup>77</sup> *Seitel Data*, 92 A.3d at 860–63.

<sup>78</sup> *Sunoco Pipeline, L.P.*, No. P-2014-2411941, 2014 WL 5810345, \*28 (Pa. Pub. Util. Comm’n, Oct. 2, 2014).

granting of Sunoco's petition may go towards further weakening the applicability of *Robinson Township*, although a PUC adjudicatory hearing would likely be narrow.<sup>79</sup>

The most significant post-*Robinson Township* decision was the Commonwealth Court's January 2015 holding in *Pennsylvania Environmental Defense Foundation v. Commonwealth*.<sup>80</sup> The Commonwealth Court expands greatly on the Pennsylvania Supreme Court's section 27 reasoning, engaging in a balancing test weighing the duties of the Commonwealth as trustee over the environment with its other duties.<sup>81</sup> In doing so, it leans heavily on *Payne v. Kassab* (before both the Commonwealth Court in *Payne I*<sup>82</sup> and the Pennsylvania Supreme Court in *Payne II*<sup>83</sup>) which created the balancing test. The *Payne I* court weighed (1) compliance with applicable statutes and regulations relevant to the protection of public natural resources; (2) reasonable effort to keep environmental disruption to a minimum; and (3) the weight between the environmental harm at stake and the benefits derived.<sup>84</sup> Although the Commonwealth Court notes the Pennsylvania Supreme Court's plurality criticism of the *Payne* test in *Robinson Township*, the Commonwealth Court states that because *Robinson Township* is only a plurality, *Payne I* is still valid precedent with *Payne II* being useful to the balancing test analysis.<sup>85</sup> Additionally, the Commonwealth Court's decision challenging *Robinson Township*'s applicability brings further speculation that the Pennsylvania Supreme Court will be forced to take a second look at *Robinson Township* although it has denied doing so previously.<sup>86</sup> Because of recent turnover in the Pennsylvania Supreme Court, a second look may bring a different opinion.<sup>87</sup> In conclusion, the Commonwealth Court turns

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<sup>79</sup> *Id.* at \*27.

<sup>80</sup> Pa. Env'tl. Def. Found. v. Commonwealth, 108 A.3d 140 (Pa. Commw. Ct. 2015).

<sup>81</sup> *Id.* at 157.

<sup>82</sup> *Payne v. Kassab*, 312 A.2d 86 (Pa. Commw. Ct. 1973) [hereinafter *Payne I*].

<sup>83</sup> *Payne v. Kassab*, 361 A.2d 263 (Pa. 1976) [hereinafter *Payne II*].

<sup>84</sup> Pa. Env'tl. Def. Found., 108 A.3d at 158. *Id.* at \*14 (quoting *Payne I*, 312 A.2d at 94).

<sup>85</sup> *Id.* at 159.

<sup>86</sup> See Marie Cusick, *Pa. Supreme Court Will Not Reconsider Act 13 Decision*, NAT'L. PUB. RADIO (Feb. 21, 2014), <http://stateimpact.npr.org/pennsylvania/2014/02/21/pa-supreme-court-will-not-reconsider-act-13-decision/>.

<sup>87</sup> See Andrew Bockis et al., *Unanimous Pennsylvania Commonwealth Court Rules that the Supreme Court's Interpretation of Environmental Rights Amendment in Landmark Robinson Township*

the *Robinson Township* plurality on its head, stripping it of much of its power until the Pennsylvania Supreme Court produces a majority opinion. Instead, the *Payne* test is resurrected, bringing with it an entirely different set of tools for the Commonwealth and its subdivisions.

#### IV. IMPLICATIONS OF *ROBINSON TOWNSHIP*'S ALTERATION OF THE ZONING LANDSCAPE

Going beyond the clear implications of the *Robinson Township* decision on the future of oil and gas development, municipalities may attempt to use the decision's plurality opinion or Justice Baer's concurrence as ammunition to further regulate or block industrial or commercial activities, or activities by the Commonwealth. Whether it be oil and gas, heavy industry, mining or commercial activity, *Robinson Township*'s plurality and concurrence would seem to provide municipalities with a great deal of additional leeway—either through section 27 arguments or through due process zoning arguments—when it comes to regulating both business and government activities within their borders.

##### A. Government Activities

Looking back at the examples of municipal zoning cases previously discussed, a common theme emerges; frequently, the Commonwealth seeks to establish a facility within its control that is typically controversial, e.g. corrections, mental health, or medical facilities. In *Ogontz*, the Commonwealth sought to establish a mental health facility, and a neighborhood group objected to that usage in a residential zone.<sup>88</sup> In *City of Pittsburgh*, a pre-release center for female inmates was challenged by the city.<sup>89</sup> In *Olon*, the Commonwealth sought to renovate a former college into a correctional facility.<sup>90</sup> While NIMBYism (“Not In My Backyard”) is a

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*Decision is Nonbinding*, JDSUPRA BUS. ADVISOR (Jan. 12, 2015), <http://www.jdsupra.com/legalnews/unanimous-pennsylvania-commonwealth-cour-50931/>.

<sup>88</sup> Commonwealth Dep't of Gen. Servs. v. Ogontz Area Neighbors Ass'n, 483 A.2d 448 (Pa. 1984).

<sup>89</sup> City of Pittsburgh v. Commonwealth, 360 A.2d 607 (Pa. 1976).

<sup>90</sup> Olon v. Commonwealth Dep't of Corrections, 626 A.2d 533 (Pa. 1993).

common hurdle for these types of projects,<sup>91</sup> under *Olon* the Commonwealth could maneuver around expected backlash by specifically and clearly expressing intent to override local zoning ordinances. Depending on the lower courts' interpretation of the breadth of the *Robinson Township* opinion going forward, however, this power of the Commonwealth to circumvent local opposition to necessary facilities may be in jeopardy.

Using the plurality opinion, a municipality may attempt, presumably at the behest of its residents, to use section 27 arguments justifying its zoning scheme to override the state's desire to establish undesirable facilities. However, a municipality would be required in that scenario to demonstrate its actions are necessary to protect its residents' "right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment" required in section 27.<sup>92</sup> In a scenario like *Olon* where a former college campus would be turned into a corrections facility, the municipality could conceivably make the argument that a campus' natural aesthetics, landscaping and other features are assets to the public for recreation; as such, losing that space and having it become a state-operated corrections facility (which would by its nature be restricted from the public) may damage the natural, scenic, historic and aesthetic values of the environment. If, however, the proposed location is like that in *City of Pittsburgh*, where the proposed facility is in an already-developed area likely without much open space to be preserved, the municipality may have a much weaker argument against the use of space by the state.

A much broader position, though, would be for the municipality to argue, under Justice Baer's concurrence, that due process necessitates that municipal zoning decisions not be usurped by the Commonwealth. Under Justice Baer's rationale, a municipality whose zoning scheme is in conflict with a proposed usage by the Commonwealth—even if the usage is specifically and clearly detailed in a statute—would likely succeed in its attempt to regulate or restrict a particular Commonwealth usage. Because local control is so vital to maintaining the rights of residents to enjoy their own property without interference or injury from neighbors, municipal

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<sup>91</sup> See Michael B. Gerrard, *The Victims of NIMBY*, 21 *FORDHAM URB. L.J.* 495, 496 (1994).

<sup>92</sup> PA. CONST. art. I, § 27.



zoning inherently knows better than the Commonwealth concerning the particular needs and desires of an individual community. As such, if lower courts begin to adopt the kind of rationale used by Justice Baer in his concurrence, or if the Pennsylvania Supreme Court adopts this rationale in a subsequent case, it could become quite difficult for the Commonwealth to place its necessary (but unpopular) facilities in locations convenient to the individuals it serves. For example, if the Department of Corrections wishes to establish a new pre-release facility, it would likely wish to establish it in a location either nearby public transportation or within walking distance to job opportunities for the individuals. However, a great deal of locations meeting those criteria are likely populated by a number of residents who may oppose such a facility constructed close to their homes or businesses. If those residents are able to work with local authorities to establish a zoning scheme barring such a facility, the Commonwealth may be forced to build in a less ideal location, decreasing the overall effectiveness of its goal of rehabilitating inmates.

The *Payne I* test applied by the Commonwealth Court in *Environmental Defense Foundation* would appear to be more of an environmental analysis than a due process analysis. Although the Commonwealth Court declined to extend the *Robinson Township* plurality, it makes no comment on the applicability or persuasiveness of Justice Baer's concurrence, stating only that "[f]or our purposes, we find the plurality's construction of article I, section 27 persuasive only to the extent it is consistent with binding precedent from this Court and the Supreme Court on the same subject."<sup>93</sup> As a result, it still seems as though the question of whether municipalities can challenge Act 13 and similar pieces of legislation on substantive due process grounds remains open. Applying the *Payne I* test to a challenged Commonwealth facility, a municipality would need to demonstrate that the action would result in environmental harm that outweighs the benefits of the usage.<sup>94</sup> Similarly to the analysis used for the plurality, utilizing the *Payne* balancing test requires municipalities to demonstrate clear harm to the environment in addition to a failure by the Commonwealth to take reasonable precautions and a failure

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<sup>93</sup> Pa. Env'tl. Def. Found. v. Commonwealth, 108 A.3d 140, 156 n.37 (Pa. Commw. Ct. 2015).

<sup>94</sup> *Id.* at 158.

to follow its own statutes and regulations. In short, where Justice Baer presumes that local municipalities know better about how to govern their communities, *Payne I* requires municipalities to demonstrate that the government actively violated its mandate as trustee. In all likelihood, municipalities who must satisfy *Payne I* are less likely to succeed in their claim than if they only needed to satisfy *Robinson Township's* plurality or concurrence.

### *B. Business and Industry*

The second practical application of *Robinson Township* is its effect on the ability of municipalities to regulate through zoning the businesses and industries within their borders. Just as there are certain Commonwealth facilities that could be considered undesirable, certain types of business or industry could also be considered undesirable for municipalities and residents. Whether the business produces excessive pollution, noise, traffic, or other characteristics that affect neighboring residents, a municipality could determine that it does not wish to have those types of businesses within its borders.<sup>95</sup> Pieces of legislation like Act 13, however, restrict municipalities from differentiating between different industries, barring municipalities from “impos[ing] conditions, requirements or limitations . . . more stringent than conditions, requirements or limitations imposed on construction activities for other industrial uses.”<sup>96</sup>

The legislature, forcing municipalities to treat all industrial uses as equal, takes from those municipalities the ability to make independent judgments on zoning according to the needs and desires of its residents. Such a policy could significantly affect commerce by restricting the ability for municipalities, for example, to focus its public outreach on bringing in a particular type of industry through its zoning scheme. If a municipality determines that due to strategic geographic position, the unique skills of its workforce, or for another specific purpose it wishes to attract a particular

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<sup>95</sup> See Michael Burger, *The (Re)Federalization of Fracking Regulation*, 2013 MICH. ST. L. REV. 1483, 1503 (2013) (stating that “the message these local bans send is clear: the increasing scale of operations and increasing risk of pollution and community impacts are a widespread concern in rural America”).

<sup>96</sup> 58 PA. CONS. STAT. § 3304(b)(2) (2012).

type of industry to invest in the municipality by creating a new type of zone tailored to suit the needs of that industry's operations, it could come under fire from a competing industry for its one-sided actions. The fear of legal challenge could prevent municipalities from attempting to attract industrial investment through zoning altogether, potentially crippling the commercial benefits of individual municipalities attempting to specialize in attracting specific industries.

In a situation where a municipality wishes to restrict a private industrial usage, *Robinson Township* may not have much effect because Act 13 specifically confronted the ability of municipalities to restrict oil and gas operations beyond those imposed on other industries. In the absence of a similar piece of legislation for a different industry, application of *Robinson Township*'s plurality to an issue where a municipality restricts an industry from establishing itself within their borders may prove difficult. On the other hand, *Robinson Township* also establishes the responsibility for municipalities to fulfill their duties in protecting the environment according to the mandate in article I, section 27, stating that "all existing branches and levels of government derive constitutional duties and obligations with respect to the people."<sup>97</sup> Professors Dernbach, May, and Kristl emphasize this stating "article I, section 27 challenges to local actions (such as zoning or other ordinances) or non-actions (such as the failure to have zoning or other ordinances) are theoretically possible."<sup>98</sup> The possibility of residents pursuing municipalities for failing to uphold their constitutional mandate of stewardship is a new option of potential relief for residents who disagree with their municipality.

In an opposite scenario from the one in *Robinson Township*, where residents pursue an action against a municipality for failing to protect the environment by allowing certain industrial activities, residents would need to establish that the municipality failed to make reasonable decisions as trustee of the environment on behalf of its residents. This scenario, though, may run in conflict with Justice Baer's concurrence, which puts great stock in the authority of municipalities to make zoning decisions.<sup>99</sup> Although Justice Baer's concurrence discusses that importance, disputes between

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<sup>97</sup> *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 977 (Pa. 2013).

<sup>98</sup> Dernbach et al., *supra* note 11, at 1185.

<sup>99</sup> *Id.* at 1186–88.

residents and their municipalities over zoning decisions are not novel issues, and entire bodies of case law exist to resolve those disputes.<sup>100</sup>

A court adopting Justice Baer's interpretation would significantly alter the ability of the Commonwealth to issue legislation specifically permitting controversial commercial or industrial practices. Because of the controversial and politically-polarizing nature of hydraulic fracturing,<sup>101</sup> Justice Baer respects the legislature's decision to "supersede some of the duties and responsibilities municipalities previously have exercised in related to land-use planning and the environment."<sup>102</sup> Similar to the Commonwealth's specific legislation when establishing controversial facilities, the legislature may have determined that Act 13 was necessary to protect against each municipality individually banning natural gas extraction.<sup>103</sup> Additionally, it should be noted, as has been indicated elsewhere,<sup>104</sup> municipal governments are not above overly-provincial decision-making to the detriment of both residents and businesses.

The Commonwealth Court's analysis might also be relevant to a dispute between a municipality and its residents over industry in this new landscape. If a municipality restricts certain industry, industry groups or interested residents could claim that the municipality's decision to restrict fails to fairly balance environmental harm with a derived benefit.<sup>105</sup> However, this may only be a plausible argument if the municipality restricts industry on environmental grounds; if, for example, the municipality is clear that its rationale for restricting industry has nothing to do with environmental concerns, there may be no recourse under *Environmental Defense Foundation*.<sup>106</sup>

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<sup>100</sup> See *Hopewell Twp. Bd. of Supervisors v. Golla*, 452 A.2d 1337, 1341 (Pa. 1982) (holding that an ordinance must "bear a substantial relationship to the health, safety, morals, or general welfare of the community").

<sup>101</sup> See generally *Fershee*, *supra* note 8 (discussing the controversy surrounding hydraulic fracturing).

<sup>102</sup> *Robinson Twp.*, 83 A.3d at 1007 (Baer, J., concurring) (quoting Justice Saylor's dissent).

<sup>103</sup> See *Richardson*, *supra* note 9, at 623 (comparing hydraulic fracturing to the construction of cellular towers, and advocating for a "substantial evidence" requirement for local land use decisions).

<sup>104</sup> See *A First Take on Robinson Township v. Commonwealth*, MCGUIRE WOODS LLP (Dec. 14, 2013), <https://www.mcguirewoods.com/sitecore/content/McGuire-Woods/Home/Client-Resources/Alerts/2013/12/Robinson-Township-v-Commonwealth.aspx>.

<sup>105</sup> *Pa. Env'tl. Def. Found. v. Commonwealth*, 108 A.3d 140, 157 (Pa. Commw. Ct. 2015).

<sup>106</sup> Note, however, that the industry representatives or residents may be able to challenge such a zoning decision on other grounds.

The implications of *Robinson Township* and its subsequent proceedings are a mixture of significant change and unknown applicability. The opinion certainly appears to build from previous municipal zoning case law and has the potential to significantly affect Commonwealth agencies' ability to create and operate their facilities in municipalities who oppose them. It also has the potential for residents, industry groups or municipalities to bring actions regarding municipal zoning decisions—either in favor of new industry or restricting it. Additionally, the nature of the opinion's diversity in its plurality, concurrence and two dissents create questions on its future applicability and scope, with one court already significantly narrowing its scope of applicability.<sup>107</sup>

#### V. PROPOSING A HYBRID APPROACH

Going forward, Pennsylvania courts will likely revisit the principles of *Robinson Township* to either bolster its plurality opinion or modify its holding in light of cases like *Environmental Defense Foundation*. Given the new composition of the Pennsylvania Supreme Court following the election of three new Democrat Justices,<sup>108</sup> as well as the March 2016 resignation of another Justice,<sup>109</sup> the adoption of a wholly new framework—and potentially a solid majority opinion—may occur with a second look. In March 2016, the newly-constituted Supreme Court heard new argument on *Robinson Township*.<sup>110</sup> Following a 2014 Commonwealth Court ruling addressing multiple subsequent issues stemming from the original *Robinson Township* opinion, the Court heard argument on issues related to the notification requirements of private well owners by drillers, prohibition of medical professionals from disclosing oil and gas companies' trade secrets,

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<sup>107</sup> See *Pa. Envtl. Def. Found.*, 108 A.3d at 157.

<sup>108</sup> Chris Potter, *Democrats Take Control of State Supreme Court, Win All 3 Open Seats*, PITTSBURGH POST-GAZETTE (Nov. 4, 2015, 1:02 AM), <http://www.post-gazette.com/news/politics-local/2015/11/03/Polls-open-at-7-a-m-in-Pennsylvania-voting-pittsburgh-election-day/stories/201511030149>.

<sup>109</sup> Angela Coulombis, Craig R. McCoy & Mark Fazlollah, *Amid porn email furor, Eakin resigns from high court*, PHILA. ENQUIRER (Mar. 17, 2016), [http://articles.philly.com/2016-03-17/news/71576638\\_1\\_michael-eakin-supreme-court-ethics-case](http://articles.philly.com/2016-03-17/news/71576638_1_michael-eakin-supreme-court-ethics-case).

<sup>110</sup> Candy Woodall, *'What makes it a public utility?': Pa. Supreme Court hears arguments on oil and gas regulations*, HARRISBURG PATRIOT-NEWS (Mar. 9, 2016, 7:39 PM), [http://www.pennlive.com/news/2016/03/what\\_makes\\_it\\_a\\_public\\_utility.html](http://www.pennlive.com/news/2016/03/what_makes_it_a_public_utility.html).

eminent domain concerns related to gas storage wells, and severability provisions in Act 13.<sup>111</sup> Although the 2014 Commonwealth Court decision and March 2016 Supreme Court argument do not directly address the underlying holding of the Supreme Court's 2013 *Robinson Township* decision or many of its underlying zoning implications,<sup>112</sup> the lasting nature of the *Robinson Township* litigation demonstrates a near-constant evolution of the jurisprudence in both the Commonwealth Court and Supreme Court, making long-term predictability of *Robinson Township*'s application difficult. Going forward, Pennsylvania courts could adopt somewhat of a hybrid approach, encompassing an affirmation of Justice Baer's emphasis on municipal zoning as a fundamental protector of procedural due process, a reaffirmation of the rights of Pennsylvania citizens and the mandate for the Commonwealth to maintain its natural resources, and an allowance for the Commonwealth to undertake its activities in strategic, efficient locations—even if those activities may be unpopular with the local population.

Such an approach would still restrict the Commonwealth, under Justice Castille's plurality, from "degrading [the] trust" of maintaining the Commonwealth's natural resources through any of its actions in contrast with the Environmental Rights Amendment. The hybrid approach would also affirm Justice Baer's belief in municipal zoning as a safeguard of procedural due process, as it would largely restrict the Commonwealth from interfering with duly enacted municipal zoning, and creates the assumption that municipal zoning is the purest voice of the peoples' desires and interests. To combat the fear that the Commonwealth under this scheme would be unable—or at least would find it impractical—to undertake its necessary activities found to be societally unpopular, an exception would be created allowing the Commonwealth to establish and maintain necessary facilities like mental health, correctional, and other facilities with the onus on the Commonwealth to demonstrate that its chosen location is the most

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<sup>111</sup> *Robinson Twp. v. Commonwealth*, 96 A.3d 1104 (Pa. Commw. Ct. 2014).

<sup>112</sup> Although zoning implications were not a primary matter of concern in the Commonwealth Court's 2014 decision or in the Supreme Court's 2016 argument, the Commonwealth Court does reference that "[l]ocal zoning matters will now be determined by the procedures set forth under the MPC and challenges to local ordinances that carry out a municipality's constitutional environmental obligations," and that sections 3305 and 3306 are not severable from the remainder of Act 13. *Id.* at 1122.

practical and efficient. While such an exception may cause new litigation if the chosen municipality objects to the usage and slightly weakens Justice Baer's approach, the hybrid approach balances the needs of the Commonwealth with the freedom of municipalities to act as they please, all while keeping the Commonwealth faithful to the Environmental Rights Amendment.

The hybrid approach would be more restrictive than the Commonwealth Court's *Payne I* test, which was affirmed by that court in *Environmental Defense Foundation*.<sup>113</sup> Where the Commonwealth must demonstrate only a "reasonable effort to keep environmental disruption to a minimum" and balances the environmental harm with the economic benefit,<sup>114</sup> the hybrid approach would take the restrictive view of mandating that the Commonwealth act as a steward of the Commonwealth's natural resources and skews a balancing test much more towards environmental preservation. On the other hand, the hybrid approach may only address Commonwealth actions in contrast with the Environmental Rights Amendment, which would allow municipalities to weigh the costs and benefits of industrial development for themselves through zoning. While industry may likely object to this approach as it strips the Commonwealth's ability to force objecting municipalities to consent to industrial development statewide, it still can perform its activities in friendly municipalities.

In the case of hydrofracturing, the Commonwealth's Act 13 would still fail this hybrid test and would allow municipalities who wish to have fracking between their borders to zone as such, while permitting municipalities who object to the practice to restrict it. While there may be difficulties in implementation—many energy companies sign leases with landowners to drill for natural gas years before they actually begin operations, presenting issues where a municipality later determines that it would not allow drilling through its zoning scheme and the question of whether municipalities are beholden to the Environmental Rights Amendment the same way the Commonwealth is—it may present the best approach for balancing the complicated issues stemming from

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<sup>113</sup> *Pa. Env'tl. Def. Found.*, 108 A.3d at 157.

<sup>114</sup> *Payne v. Kassab*, 361 A.2d 263 (Pa. 1976).

Pennsylvania's large number of small, inter-connected, independent municipalities.

## VI. CONCLUSION

The Pennsylvania Supreme Court's *Robinson Township* opinion continues to pose significant questions regarding the future of environmental regulation in the Commonwealth. In addition, the plurality and particularly Justice Baer's concurrence argue for a much stronger role for municipalities to zone as they see fit, even going so far as to indicate that municipal zoning is constitutionally necessary to protect the due process rights of residents. As the utilization and ramifications of *Robinson Township* continue to be realized both at the local level,<sup>115</sup> the administrative level,<sup>116</sup> in the appellate courts,<sup>117</sup> and within industry,<sup>118</sup> the emphasis on zoning rights has the potential to greatly increase the power of municipalities to permit, regulate, or restrict certain land uses within their borders. Through analyzing the *Robinson Township* opinion, Pennsylvania zoning law, and courts' decisions subsequent to *Robinson Township*, we can attempt to accurately predict if and how municipalities' zoning responsibilities are altered in this new landscape.

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<sup>115</sup> See Francesca Sacco, *Judge Denies Robinson Township Residents' Request for Stay in Drilling*, OBSERVER-REP. (Jan. 5, 2015), available at <http://www.observer-reporter.com/apps/pbcs.dll/article?AID=/20150105/NEWS01/150109752#.VMXY6CvF-So>.

<sup>116</sup> See *Harvilchuck v. Commonwealth*, No. 2013-013-M, 2014 WL 4957400, \*11 n.13 (Pa. Env'tl. Hearing. Bd., Sept. 14, 2014) (referencing *Robinson Township*, but noting that petitioner could not make a section 27 challenge on procedural grounds).

<sup>117</sup> See *Pa. Env'tl. Def. Found. v. Commonwealth*, 108 A.3d 140, 157 (Pa. Commw. Ct. 2015).

<sup>118</sup> See MCGUIRE WOODS LLP, *supra* note 104, for an analysis on *Robinson Township's* effect on the oil and gas industries.